176 (1)

Supreme Court, U.S.
FILED

No. 10-10-771 DEC 8 - 2010

OFFICE OF THE CLERK
William K. Suter, Clerk

In The

# Supreme Court of the United States

NILSON HERNEY VALENCIA-RIASCOS,

*Petitioner,*

vs.

ERIC H. HOLDER, JR.,
UNITED STATES ATTORNEY GENERAL,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

MATTHEW PAUL NICKSON
1300 McGowen
Houston, Texas 77004
mpnickson@gmail.com
(713) 655-8880

*Counsel of Record for the Petitioner*

December 8, 2010

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

## QUESTIONS PRESENTED FOR REVIEW

Whether 8 U.S.C. § 1252(d)(1), pertaining to the judicial review of final orders of removal, sets forth a jurisdictional issue exhaustion requirement.

Whether, if 8 U.S.C. § 1252(d) indeed sets forth a jurisdictional issue exhaustion requirement, the application of the requirement to the Petitioner's deportation appeal may contravene the fundamental fairness guarantee of the Fifth Amendment.

## RULE 29.6 STATEMENT

The Petitioner is Nilson Herney Valencia-Riascos.

The Respondent is Eric H. Holder, Jr., the United States Attorney General.

No corporations, partnerships, or similar entities are involved.

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED FOR REVIEW | i |
| RULE 29.6 STATEMENT | ii |
| PETITION FOR CERTIORARI | 1 |
| OPINIONS AND ORDERS BELOW | 1 |
| STATEMENT OF JURISDICTION | 2 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED | 2 |
| STATEMENT OF THE CASE | 3 |
| SUMMARY OF REASONS FOR ALLOWING THE WRIT | 5 |
| REASONS FOR ALLOWING THE WRIT | 9 |
| I. BECAUSE THE HOLDING BY THE COURT OF APPEALS THAT THE ISSUE EXHAUSTION BAR AT 8 U.S.C. § 1252(d)(1) IS JURISDICTIONAL CONFLICTS BOTH WITH *SIMS V. APFEL*, 530 U.S. 103 (2000) AND WITH THE JURISPRUDENCE OF THE SECOND CIRCUIT, THIS COURT SHOULD GRANT CERTIORARI SO AS TO CONFIRM THAT THE IMMIGRATION ISSUE EXHAUSTION BAR IS NOT JURISDICTIONAL | 9 |
| A. THE DECISION BELOW CONFLICTS WITH *SIMS V. APFEL* | 9 |
| B. THOUGH A CIRCUIT SPLIT EXISTS ABOUT WHETHER AN IMMIGRANT'S DUTY TO EXHAUST ISSUES IS JURISDICTIONAL, THE SECOND CIRCUIT HAS ADOPTED THE SOUNDER, NON-JURISDICTIONAL APPROACH | 16 |

TABLE OF CONTENTS – Continued

Page

1. SURVEY OF THE NATIONAL LAW CONSTRUING THE IMMIGRATION APPEAL ISSUE EXHAUSTION REQUIREMENT ..... 17

2. FOUR ADDITIONAL CONSIDERATIONS AGAINST THE NINTH CIRCUIT'S POSITION ..... 20

C. ASSUMING THE COURT DETERMINES THAT THE COURTS OF APPEALS CAN WAIVE THE ISSUE EXHAUSTION REQUIREMENT, STRONG CONSIDERATIONS SUPPORT DOING SO WITH RESPECT TO THE PETITIONER'S PARTICULAR SOCIAL GROUP CLAIM ..... 34

II. AS APPLIED TO THE PETITIONER, A JURISDICTIONAL ISSUE EXHAUSTION REQUIREMENT WOULD VIOLATE THE FIFTH AMENDMENT GUARANTEE OF FUNDAMENTALLY FAIR REMOVAL PROCEEDINGS ..... 35

CONCLUSION ..... 37

APPENDIX

APPENDIX A: Opinion of the United States Court of Appeals for the Ninth Circuit ..... App. 1

APPENDIX B: Opinion of the Board of Immigration Appeals ..... App. 3

APPENDIX C: Opinion of the Immigration Judge ..... App. 4

APPENDIX D: Amended Order of the Immigration Judge ..... App. 16

TABLE OF CONTENTS – Continued

Page

APPENDIX E: Original Order of the Immigration Judge ..... App. 19

APPENDIX F: Order of the United States Court of Appeals for the Ninth Circuit denying rehearing and denying rehearing en banc..... App. 22

# TABLE OF AUTHORITIES

Page

CASES

*Abebe v. Gonzales*, 432 F.3d 1037 (9th Cir. 2005) (en banc) ..... 10

*Aden v. Holder*, 589 F.3d 1040 (2009) ..... 30, 31

*Aguilar v. U.S. Immigration and Customs Enforcement*, 510 F.3d 1 (1st Cir. 2007) ..... 24

*Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006) ..... *passim*

*Barron v. Ashcroft*, 358 F.3d 674 (9th Cir. 2004) ..... 5, 6, 7, 9, 10

*Bowles v. Russell*, 551 U.S. 205 (2007) ..... 10, 19, 20

*Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 (1940) ..... 29

*Citizens United v. Federal Election Commission*, 558 U.S. ___, 130 S.Ct. 876 (2010) ..... 30

*De La Cruz Galvan v. Mukasey*, 2010 WL 2232664 (2010) (not selected for publication) ..... 33

*Da Silva v. Kinsho Intern. Corp.*, 229 F.3d 358 (2d Cir. 2000) ..... 28

*Dhaliwal v. Holder*, 349 Fed.Appx. 147 (2009) (not selected for publication) ..... 33

*Etchu-Njang v. Gonzales*, 403 F.3d 577 (8th Cir. 2005) ..... 17, 18, 21, 25

*Fajardo-Alvarez v. Holder*, 349 Fed.Appx. 198 (2009) (not selected for publication) ..... 33

*Farhoud v. I.N.S.*, 122 F.3d 794 (9th Cir. 1997) ..... 10

TABLE OF AUTHORITIES – Continued

Page

*Fernandez-Bernal v. Attorney General of U.S.*, 257 F.3d 1304 (11th Cir. 2001) ..... 6, 18

*Fong Yue Ting v. United States*, 149 U.S. 698 (1893) ..... 8

*FPC v. Colorado Interstate Gas Co.*, 348 U.S. 492 (1955) ..... 14

*Gamboa Najera v. Holder*, 316 Fed.Appx. 693 (2009) (not selected for publication) ..... 34

*Gasparyan v. Holder*, 339 Fed.Appx. 797 (2009) (not selected for publication) ..... 33

*Grullon v. Mukasey*, 509 F.3d 107 (2d Cir. 2007), *certiorari denied*, 129 S.Ct. 43 (2008) ..... 12, 19

*Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995) ..... 32

*Hernandez v. Holder*, 2010 WL 4683903 (Nov. 21, 2010) (not selected for publication) ..... 33

*Hill v. McDonough*, 547 U.S. 573 (2006) ..... 23

*I.N.S. v. St. Cyr*, 533 U.S. 289 (2001) ..... 32, 36

*Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982) ..... 29

*Jama v. Immigration and Customs Enforcement*, 543 U.S. 335 (2005) ..... 26

*Jones v. Bock*, 549 U.S. 199 (2007) ..... 23

*Koons Pontiac Buick GMC, Inc. v. Nigh*, 543 U.S. 50 (2004) ..... 22

TABLE OF AUTHORITIES – Continued

Page

*Korsunskiy v. Gonzales*, 461 F.3d 847 (7th Cir. 2006) ..... 6, 18

*Kucana v. Holder*, 558 U.S. ___, 130 S.Ct. 827 (2010) ..... 14, 15, 32, 37

*Laing v. Ashcroft*, 370 F.3d 994 (9th Cir. 2004) ..... 34

*Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 63 (1993) ..... 23

*Lebron v. National Passenger Railroad Co.*, 513 U.S. 374 (1995) ..... 30

*Lin v. Attorney General of U.S.*, 543 F.3d 114 (3d Cir. 2008) ..... 5, 17

*Lopez-Navarrete v. Holder*, 2010 WL 4851324 (Nov. 30, 2010) (not selected for publication) ..... 33

*Mambwe v. Holder*, 572 F.3d 540 (8th Cir. 2009) ..... 6, 18

*Marine Mammal Conservancy, Inc. v. Department of Agriculture*, 134 F.3d 409 (C.A.D.C. 1998) ..... 14

*Marrero Pichardo v. Ashcroft*, 374 F.3d 46 (2d Cir. 2004)) ..... 19

*Massachusetts v. E.P.A.*, 549 U.S. 497 (2007) ..... 24

*Massis v. Mukasey*, 549 F.3d 631 (4th Cir. 2008), *certiorari denied sub nom., Massis v. Holder*, 130 S.Ct. 736 (2009) ..... 6, 18, 19

*Mathews v. Eldridge*, 424 U.S. 319 (1976) ..... 13

*McCarthy v. Madigan*, 503 U.S. 140 (1992) ..... 11, 15, 35

TABLE OF AUTHORITIES – Continued

Page

*McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991) ..... 32

*Michel v. Holder*, 358 Fed.Appx. 980 (2009) (not selected for publication) ..... 33

*Morales-Alegria v. Gonzales*, 449 F.3d 1051 (9th Cir. 2006) ..... 10

*Omari v. Holder*, 562 F.3d 314 (5th Cir. 2009) ..... 6, 19

*Orellana-Martinez v. Holder*, 2010 WL 4721196 (Nov. 22, 2010) (not selected for publication) ..... 33

*Owens v. Republic of Sudan*, 531 F.3d 884 (D.C. Cir. 2008) ..... 11

*Padilla v. Kentucky*, 559 U.S. ___, 130 S.Ct. 1473 (2010) ..... 8, 36

*Pjetri v. Gonzales*, 468 F.3d 478 (7th Cir. 2006) ..... 6, 18

*Portillo-Mendez v. Holder*, 2010 WL 4780849 (Nov. 24, 2010) (not selected for publication) ..... 33

*Ramani v. Ashcroft*, 378 F.3d 554 (6th Cir. 2004) ..... 6, 18

*Rendon v. Mukasey*, 520 F.3d 967 (9th Cir. 2008) ..... 10, 31

*Reno v. Catholic Social Services, Inc.*, 509 U.S. 43 (1993) ..... 32

*Rodriguez-Vera v. Holder*, 348 Fed.Appx. 280 (2009) (not selected for publication) ..... 33

*Romero-Reyes v. Holder*, 362 Fed.Appx. 568 (8th Cir. 2010) (not selected for publication) ..... 6, 18

TABLE OF AUTHORITIES – Continued

Page

*Sims v. Apfel*, 530 U.S. 103 (2000) ..... *passim*

*Sousa v. I.N.S.*, 226 F.3d 28 (1st Cir. 2000) ..... 5, 17

*Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998) ..... 27

*Stoll v. Gottlieb*, 305 U.S. 165 (1938) ..... 29

*Sun v. Ashcroft*, 370 F.3d 932 (9th Cir. 2004) ..... 31

*Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002) ..... 24

*Tionda v. Holder*, 2010 WL 4746148 (Nov. 23, 2010) (not selected for publication) ..... 33

*United States v. Jacobo Castillo*, 496 F.3d 947 (9th Cir. 2007) (en banc) ..... 11, 20

*United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33 (1952) ..... 14, 26

*United States v. Pallares-Galan*, 359 F.3d 1088 (9th Cir. 2004) ..... 31

*United States v. Williams*, 504 U.S. 36 (1994) ..... 30

*Vaden v. Discover Bank*, 129 S.Ct. 1262 (2009) ..... 23

*Vasquez-Aguirre v. Holder*, 362 Fed.Appx. 736 (2010) (not selected for publication) ..... 33

*Verizon Communications Inc. v. F.C.C.*, 535 U.S. 467 (2002) ..... 36

*Washington Assn. for Television and Children v. FCC*, 712 F.2d 677 (C.A.D.C. 1983) ..... 14

*Whitfield v. United States*, 543 U.S. 209 (2005) ..... 22, 25

TABLE OF AUTHORITIES – Continued

Page

*Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645 (1982) ..... 14, 25

*Yung Ying Shi v. Holder*, 337 Fed.Appx. 666 (2009) (not selected for publication) ..... 34

*Zara v. Ashcroft*, 383 F.3d 927 (9th Cir. 2004) ..... 10

*Zhang v. Ashcroft*, 388 F.3d 713 (9th Cir. 2004) ..... 30

*Zhong v. U.S. Department of Justice*, 480 F.3d 104 (2d Cir. 2007) (denying consideration) ..... 16, 19

*Zhong v. U.S. Department of Justice*, 489 F.3d 126 (2d Cir. 2007) ..... *passim*

*Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982) ..... 27

STATUTES

5 U.S.C. § 704 ..... 24

8 U.S.C. § 1105a ..... 17, 22

8 U.S.C. § 1152 ..... 22

8 U.S.C. § 1227 ..... 2

8 U.S.C. § 1229a ..... 2

8 U.S.C. § 1252 ..... *passim*

9 U.S.C. § 203 ..... 23

9 U.S.C. § 205 ..... 24

15 U.S.C. § 77i ..... 24

15 U.S.C. § 78y ..... 24

18 U.S.C. § 371 ..... 24

TABLE OF AUTHORITIES – Continued

Page

18 U.S.C. § 1956 .....22, 24, 25

21 U.S.C. § 846 .....24, 25

28 U.S.C. § 1254 .....2

28 U.S.C. § 1331 .....27, 28

28 U.S.C. § 1332 .....27

28 U.S.C. § 2107 .....19, 20

28 U.S.C. § 2241 .....37

28 U.S.C. § 2349 .....24

29 U.S.C. § 160 .....14, 24

29 U.S.C. § 210 .....24

42 U.S.C. § 1997e.....23

42 U.S.C. § 2000e-5 .....27, 28

42 U.S.C. § 7521 .....24

47 U.S.C. § 405 .....14

Administrative Procedure Act.....24

Federal Arbitration Act.....23

Hobbs Administrative Orders Review Act. .....24

Illegal Immigration Reform and Immigrant Responsibility Act, 110 Stat. 3009-546 .....22

Prison Litigation Reform Act .....23

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. V ..... i, 2, 35, 36

U.S. CONST. art. I, § 1 ..... 11

U.S. CONST. art. I, § 8 ..... 11

U.S. CONST. art. III, § 2, cl. 1-2 ..... 11, 36

RULES AND REGULATIONS

8 C.F.R. § 1003.3 ..... 15

8 C.F.R. § 1003.1 ..... 12

OTHER AUTHORITIES

H.R. Conf. Rep. 104-828 ..... 22

United Nations Convention Against Torture ..... 30, 36

## PETITION FOR CERTIORARI

The Petitioner, Nilson Herney Valencia-Riascos, prays that a writ of certiorari be granted to review and reverse the judgment entered below by the United States Court of Appeals for the Ninth Circuit.

## OPINIONS AND ORDERS BELOW

The Ninth Circuit opinion denying relief to the Petitioner is unreported. It is available at 383 Fed.Appx. 662, and at 2010 WL 2354147. *See* App. to Pet. for Cert., at pp. 1-2. The decision was issued on June 14, 2010.

On September 9, 2010, the court of appeals denied the Petitioner's timely joint motion for rehearing and for rehearing en banc. *See id.*, at p. 22.

Judge Canby had recommended that rehearing en banc be granted. *See id.*

The unreported summary affirmance by the Board of Immigration Appeals is included in the App. to Pet. for Cert., at p. 3.

The unreported opinion of the immigration judge is included in the App. to Pet. for Cert., at pp. 4-15.

## STATEMENT OF JURISDICTION

The Court possesses jurisdiction over this appeal pursuant to 28 U.S.C. § 1254(1), since this appeal concerns a civil removal proceeding initiated before the U.S. Department of Justice, Executive Office for Immigration Review, pursuant to 8 U.S.C. §§ 1227, 1229a, and since the result of the proceeding was subsequently reviewed by the United States Court of Appeals for the Ninth Circuit pursuant to 8 U.S.C. § 1252.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

8 U.S.C. § 1252(d), treating certain preconditions to the judicial review over a final order of removal, provides:

> (d) Review of final orders
>
> A court may review a final order of removal only if –
>
> (1) the alien has exhausted all administrative remedies available to the alien as of right, and
>
> (2) another court has not decided the validity of the order, unless the reviewing court finds that the petition presents grounds that could not have been presented in the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order.

## STATEMENT OF THE CASE

This is a deportation appeal. Petitioner fears persecution at the hands of the Revolutionary Armed Forces of Colombia (FARC) guerilla group in his native Colombia. The factual events forming the bases of the Petitioner's claims to protection from removal are described by the immigration judge in her opinion denying relief. *See* App. to Pet. for Cert., at pp. 4-8.

The immigration judge found that the Petitioner had testified credibly and that he had "made a good faith effort to corroborate his claim." *See* App. to Pet.

for Cert., at pp. 9-10; *id.*, at p. 9 ("The Government concedes that Respondent testified credibly in these proceedings, and the Court so finds[.] Respondent testified consistently in what appeared to the Court to be an entirely straight forward manner."). Nevertheless, the immigration judge found that the Petitioner had failed to demonstrate a fear of future persecution on account of a political opinion. *See id.*, at pp. 10-11. Addressing the matter *sua sponte*, the immigration judge also found that the Petitioner had failed to make out a case of particular social group persecution (an issue which the Petitioner had not explicitly raised before the immigration judge). *See id.*, at pp. 11-12.

Upon administrative appeal, one member of the Board of Immigration Appeals summarily affirmed the decision by the immigration judge. App. to Pet. for Cert., at p. 3.

During the course of his administrative removal proceedings, the Petitioner was pro se and detained. He procured the assistance of this writer after having initiated an appeal to the Ninth Circuit on his own. *Accord* App. to Pet. for Cert., at pp. 1-2; 3 (BIA order disposing of the Petitioner's administrative appeal, and indicating that the Petitioner appeared pro se before the Board).

In briefing before the court of appeals, and aided by this writer, Petitioner framed his claim for relief from removal as arising from particular social group persecution. *Accord id.*, at pp. 1-2.

The court of appeals dismissed the Petitioner's judicial appeal for want of subject matter jurisdiction. *See id.* The court held that the Petitioner could not air a particular social group issue before the court because the issue had not been raised before the BIA. *See id.*

The court denied a timely motion for panel rehearing and for rehearing en banc. *See id.*, at p. 22. Though no judge requested a poll on the motion for rehearing en banc, Judge Canby had recommended that the motion for rehearing en banc be granted. *See id.*

## SUMMARY OF REASONS FOR ALLOWING THE WRIT

This deportation appeal calls for the resolution of an important question implicating the subject matter jurisdiction of the federal courts. In resolving a circuit split which has produced conflicting interpretations of 8 U.S.C. § 1252(d)(1), this Court is asked to reaffirm the principle that a simple administrative remedy exhaustion requirement must not be conflated with (and judicially enlarged into comprising) a jurisdictional, administrative issue exhaustion requirement. Along with practically all federal appeals courts except the Second Circuit, the Ninth Circuit erroneously conflates the two requirements. *Cf. Barron v. Ashcroft*, 358 F.3d 674, 677 (9th Cir. 2004); *Sousa v. I.N.S.*, 226 F.3d 28, 31 (1st Cir. 2000); *Lin v. Attorney General of U.S.*, 543 F.3d 114, 120 n.6 (3d Cir. 2008);

*Massis v. Mukasey*, 549 F.3d 631 (4th Cir. 2008), *certiorari denied sub nom.*, *Massis v. Holder*, 130 S.Ct. 736 (2009); *Omari v. Holder*, 562 F.3d 314, 324-25 (5th Cir. 2009); *Ramani v. Ashcroft*, 378 F.3d 554, 558-60 (6th Cir. 2004); *Fernandez-Bernal v. Attorney General of U.S.*, 257 F.3d 1304, 1317 n.13 (11th Cir. 2001); *but see Zhong v. U.S. Department of Justice*, 489 F.3d 126 (2d Cir. 2007) (Calabresi, J., concurring in the denial of rehearing en banc).[1]

Citing its published precedents, the Ninth Circuit dismissed the Petitioner's deportation appeal – *i.e.*, his particular social group argument – for want of subject matter jurisdiction. The court of appeals found it dispositive that "Valencia-Riascos' *pro se* Notice of Appeal to the BIA, however, even construed liberally, *see, e.g.*, *Barron v. Ashcroft*, 358 F.3d 674, 676 n.4 (9th Cir. 2004), provided the agency no notice that he was appealing the IJ's particular social group finding." App. to Pet for Cert., at p. 2; *see also Barron*, 358 F.3d, at 677 ("The plain language of § 1252(d)(1), therefore, specifically mandates that the exhaustion of administrative remedies is a prerequisite to our jurisdiction.").

---

[1] The Third and Seventh Circuits have acknowledged the controversy in this area, though their past precedents hew towards the Ninth Circuit's approach. *Cf. Romero-Reyes v. Holder*, 362 Fed.Appx. 568, 570 (8th Cir. 2010) (not selected for publication) (citing *Mambwe v. Holder*, 572 F.3d 540, 550 (8th Cir. 2009)). *Cf. Korsunskiy v. Gonzales*, 461 F.3d 847 (7th Cir. 2006), *with Pjetri v. Gonzales*, 468 F.3d 478, 481 (7th Cir. 2006).

Yet, contrary to *Barron*, 8 U.S.C. § 1252(d)(1) solely mandates the exhaustion of remedies; the plain meaning of the statute does not command issue exhaustion. The statute provides that, "A court may review a final order of removal only if the alien has exhausted all administrative remedies available to the alien as of right." 8 U.S.C. § 1252(d)(1). The statute does not refer to issues. As such, the Ninth Circuit's imputation of an issue exhaustion requirement into 8 U.S.C. § 1252(d)(1) is irreconcilable with *Sims v. Apfel*, 530 U.S. 103 (2000), a Social Security Act decision which underlines the fundamental distinction between the issue exhaustion and remedy exhaustion doctrines.

Furthermore, the Ninth Circuit's imputation of an issue exhaustion requirement into 8 U.S.C. § 1252(d)(1) is unwarranted because: (1) Congress should not be presumed to have implicitly incorporated an issue exhaustion requirement into 8 U.S.C. § 1252(d)(1); (2) this Court has taught that the lower courts should avoid "'drive-by jurisdictional rulings'" which confuse jurisdictional questions with other forms of inquiry, *see Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006) (citation omitted); (3) a jurisdictional issue exhaustion requirement will impose incalculable investigatory demands upon the courts of appeals; and (4) a jurisdictional issue exhaustion requirement will flout this Court's canon preferring statutory interpretations which preserve the right to judicial review over final agency actions.

The Second Circuit is correct about 8 U.S.C. § 1252(d)(1), and the other circuits – including the

Ninth – are incorrect. Any issue exhaustion bar is not jurisdictional. Interpreting any bar as jurisdictional perpetuates an antiquated conception of subject matter jurisdiction. *Cf. Arbaugh*, 546 U.S., at 511.

Thus, the Court should grant certiorari in order to fix definitively the jurisdictional scope of 8 U.S.C. § 1252(d)(1). Further percolation is of no benefit, since almost all courts have already weighed in upon the jurisdictional question.

This Court's intervention is doubly important because of the large volume of removal appeals, and because of the drastic consequences of deportations. *See Padilla v. Kentucky*, 559 U.S. ___, 130 S.Ct. 1473, at 1481 (2010) ("We have long recognized that deportation is a particularly severe [albeit non-criminal] 'penalty'. . . .") (quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893)).

Notwithstanding all of the foregoing, if the Court holds that 8 U.S.C. § 1252(d)(1) furnishes a jurisdictional issue exhaustion requirement, the Court is urged to grant certiorari in order to remand the appeal to the Ninth Circuit for a determination, in the first instance, about whether the application of the issue requirement to the Petitioner is fundamentally unfair, and therefore contrary to the Fifth Amendment.

## REASONS FOR ALLOWING THE WRIT

### I. Because The Holding By The Court Of Appeals That The Issue Exhaustion Bar At 8 U.S.C. § 1252(d)(1) Is Jurisdictional Conflicts Both With *Sims v. Apfel*, 530 U.S. 103 (2000) And With The Jurisprudence Of The Second Circuit, This Court Should Grant Certiorari So As To Confirm That The Immigration Issue Exhaustion Bar Is Not Jurisdictional.

#### A. The decision below conflicts with *Sims v. Apfel*

The Court ought to grant certiorari so as to reject the Ninth Circuit's holding that – because the Petitioner did not specifically raise his particular social group-based asylum claim before the Board of Immigration Appeals – he has forfeited the right to advance the claim in his judicial appeal. The Court should hold that 8 U.S.C. § 1252(d)(1) does not require issue exhaustion as a jurisdictional matter; that, in deportation appeals, issue exhaustion is a regulatory and a judicial creation, not statutory; and that, as such, the courts of appeals possess the inherent authority to determine, on remand, whether to excuse any failure by the Petitioner to exhaust the particular social group issue.

The Ninth Circuit previously had noted, in *Barron v. Ashcroft*, 358 F.3d 674 (2004), that 8 U.S.C. § 1252(d)(1) "specifically mandates that the exhaustion of administrative remedies is a prerequisite to our jurisdiction." *See Barron*, 358 F.3d, at 677. Yet

while *Barron* and other Ninth Circuit cases assume that the exhaustion of issues implicates subject matter jurisdiction, the cases do not – in analyzing the source of the issue exhaustion requirement – differentiate between exhaustion required by regulation and statutorily-mandated, jurisdictional exhaustion.[2] *See Barron*, 358 F.3d, at 677-78; *Rendon v. Mukasey*, 520 F.3d 967, 971-73 (9th Cir. 2008); *Morales-Alegria v. Gonzales*, 449 F.3d 1051, 1058-59 (9th Cir. 2006); *Abebe v. Gonzales*, 432 F.3d 1037, 1040-41 (9th Cir. 2005) (en banc); *Zara v. Ashcroft*, 383 F.3d 927, 930 (9th Cir. 2004). The distinction is nonetheless vital to interpreting the precise character of an immigrant's issue exhaustion burden. Though issue exhaustion and the exhaustion of remedies (the filing of all necessary administrative appeals antecedent to the initiation of judicial review) are no doubt related, the issue exhaustion requirement does not proceed invariably from the remedy exhaustion requirement. *See, e.g.*, *Zhong v. U.S. Department of Justice*, 489 F.3d 126 (2d Cir. 2007) (Calabresi, J., concurring in the denial of rehearing en banc). That

---

[2] For example, in *Farhoud v. I.N.S.*, 122 F.3d 794 (9th Cir. 1997), the court of appeals explained that "[f]ailure to raise an issue below constitutes failure to exhaust administrative remedies and 'deprives this court of jurisdiction to hear the matter.'" yet qualified the explanation by noting that "[t]here are exceptions to the exhaustion requirement." *See id.*, at 796. Such reasoning has since been invalidated by this Court, which subsequently has held that a failure to comply with a true jurisdictional defect cannot be pardoned or overlooked. *See Bowles v. Russell*, 551 U.S. 205 (2007).

is, a remedy exhaustion requirement can exist independently of an issue exhaustion requirement.

Congress has not expressly mandated issue exhaustion in immigration cases; consequently, no such jurisdictional exhaustion requirement exists.[3] The plain language of 8 U.S.C. § 1252 does not refer to issue exhaustion. The statute merely prescribes that, to exhaust his or her administrative appeal properly, an immigrant seeking judicial review of a deportation

---

[3] Because (1) only Congress may enlarge or constrict the jurisdiction of the federal courts (notwithstanding the constitutionally-ordained jurisdiction of this Court), *see* U.S. CONST. art. I, § 8; art. III, § 2, cl. 1-2; and, because (2) Congress and the Constitution are therefore the exclusive sources of federal jurisdiction, *accord United States v. Jacobo Castillo*, 496 F.3d 947, 954 (9th Cir. 2007) (en banc), no regulatory exhaustion rule can be construed as jurisdiction-stripping – at least not without risk of abrading the Constitutional non-delegation doctrine, by usurping a legislative prerogative. *See* U.S. CONST. art. I, § 1; *accord Owens v. Republic of Sudan*, 531 F.3d 884, 889-92 (D.C. Cir. 2008) (the Executive's authority to endow a federal court with jurisdiction over a suit against a foreign sovereign by making a factual finding that the sovereign is a terrorism sponsor does not violate the non-delegation doctrine); *id.*, at 891 (distinguishing between a delegation permitting the Executive to determine the conditions under which a court will possess jurisdiction and a delegation permitting the Executive to make factual findings affecting jurisdiction; noting the Executive's great power over foreign affairs and immigration).

Where a court retains jurisdiction over an appeal, it necessarily retains the inherent authority to excuse a party's failure or inability to satisfy a non-jurisdictional exhaustion requirement. *Cf. McCarthy v. Madigan*, 503 U.S. 140, 146 (1992).

order must first obtain a final disposition[4] from the Board of Immigration Appeals. *See Zhong*, 489 F.3d, at 129 (noting "the absence of an issue exhaustion requirement in the language of § 1252(d)(1)"); *id.*, at 131 n.8 (" . . . § 1252(d)(1) . . . does not expressly provide for an *issue* exhaustion requirement at all, much less say that any such requirement would be jurisdictional") (emphasis supplied); *cf. Grullon v. Mukasey*, 509 F.3d 107, 112 (2d Cir. 2007), *certiorari denied*, 129 S.Ct. 43 (2008) ("One of the administrative remedies available to the alien as of right is an appeal to the BIA. In this way, Congress has instructed the courts that they may not review a final order of removal unless the alien has appealed to the BIA.").

If there were any doubt about the fundamental distinction between issue exhaustion and the exhaustion of remedies, it was dispelled by *Sims v. Apfel*, 530 U.S. 103 (2000). The *Sims* Court held that a Social Security claimant need not raise particular issues for review by the Social Security Appeals Council, in order to preserve the issues for judicial consideration. *See id.*, at 112 ("Claimants who exhaust administrative remedies need not also exhaust issues in a request for review by the Appeals Council in order to preserve judicial review of those issues."). Justice Thomas, writing for the Court, explicitly

---

[4] Certification to the Attorney General, *see* 8 C.F.R. § 1003.1(h), is not "available . . . as of right," *cf.* 8 U.S.C. § 1252(d)(1).

declined to conflate the remedy and issue exhaustion doctrines:

> Nevertheless, the Commissioner [of Social Security] contends that we should require issue exhaustion in addition to exhaustion of remedies. That is, he contends that a Social Security claimant, to obtain judicial review of an issue, not only must obtain a final decision on his claim for benefits, but also must specify that issue in his request for review by the Council. (Whether a claimant must exhaust issues before the ALJ is not before us.) The Commissioner argues, in particular, that an issue-exhaustion requirement is "an important corollary" of any requirement of exhaustion of remedies. Brief for Respondent 13. We think that this is not necessarily so and that the corollary is particularly unwarranted in this case.

*Id.*, at 107. Thus, *Sims* rejects the idea that issue and remedy exhaustion are exclusively interdependent.

*Sims* also suggests the proposition that, in order for an issue exhaustion requirement to be jurisdictional, it must be commanded by statute. While the *Sims* Court refused to find that such an issue exhaustion rule applies in Social Security Act cases, the Court noted that any such requirement (in the Social Security context) would be a judicial creation, not jurisdictional. *See Sims*, 530 U.S., at 106 n.1 (citing *Mathews v. Eldridge*, 424 U.S. 319, 328 (1976)). The *Sims* Court explained:

> Initially, we note that requirements of administrative issue exhaustion are largely creatures of statute. *Marine Mammal Conservancy, Inc. v. Department of Agriculture*, 134 F.3d 409, 412 (C.A.D.C. 1998). Our cases addressing issue exhaustion reflect this fact. For example, in *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 102 S.Ct. 2071, 72 L.Ed.2d 398 (1982), we held that the Court of Appeals lacked jurisdiction to review objections not raised before the National Labor Relations Board. We so held because a statute provided that "'[n]o objection that has not been urged before the Board . . . shall be considered by the court.'" *Id.*, at 665, 102 S.Ct. 2071 (quoting 29 U.S.C. § 160(e) (1982 ed.)). Our decision in *FPC v. Colorado Interstate Gas Co.*, 348 U.S. 492, 497-498, 75 S.Ct. 467, 99 L.Ed. 583 (1955), followed similar reasoning. *See also United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36, n.6, 73 S.Ct. 67, 97 L.Ed. 54 (1952) (collecting statutes); *Washington Assn. for Television and Children v. FCC*, 712 F.2d 677, 681-682, and n.6 (C.A.D.C. 1983) (interpreting issue-exhaustion requirement in 47 U.S.C. § 405 (1982 ed.) and collecting statutes). Here, the Commissioner does not contend that any statute requires issue exhaustion in the request for review.

*Sims*, 530 U.S., at 107-108.

As a corollary, it should be added that, particularly in the wake of *Kucana v. Holder*, 558 U.S. ___, 130 S.Ct. 827 (2010), the argument that an immigration

regulation may serve as the source of a jurisdictional issue exhaustion requirement also must be rejected. Chief Judge Jacobs, dissenting from the denial of rehearing en banc in *Zhong*, appeared to argue that the federal regulation mandating the exhaustion of issues before the Board, 8 C.F.R. § 1003.3(b), imparts a jurisdictional requirement. *See Zhong v. U.S. Department of Justice*, 489 F.3d 126, 136 (2d Cir. 2007) (Jacobs, C.J., dissenting from the denial of rehearing en banc). Especially in the light of *Kucana*, this cannot be. *See Kucana*, 130 S.Ct., at 839-40; *see also McCarthy*, 503 U.S., at 149. In *Kucana*, the Court confirmed that all jurisdictional bars to the judicial review of deportation orders are statutory. *See Kucana*, 130 S.Ct., at 839-40 ("Finally, we stress a paramount factor in the decision we render today. By defining the various jurisdictional bars by reference to other provisions in the INA itself, Congress assured that it, and only it, would limit the federal courts' jurisdiction.").

When considered in the light of the plain language of 8 U.S.C. § 1252(d)(1), *Sims* and *Kucana* are inconsistent with the Ninth Circuit's issue exhaustion precedents.

Therefore, this Court should grant the petition for certiorari, so as to clarify that, in immigration cases, issue exhaustion does not implicate subject matter jurisdiction.

### B. Though a circuit split exists about whether an immigrant's duty to exhaust issues is jurisdictional, the Second Circuit has adopted the sounder, non-jurisdictional approach

Despite *Sims v. Apfel*, most courts of appeals hold that 8 U.S.C. § 1252(d)(1) imparts a jurisdictional issue exhaustion requirement. Nonetheless, the Second Circuit hews to the sounder position, that the requirement is not jurisdictional. *See Zhong v. U.S. Department of Justice*, 480 F.3d 104, 119 (2d Cir. 2007) (denying reconsideration); *id.*, at 121-22. This Court should grant certiorari in order to approve the position of the Second Circuit.

There are four reasons for overruling the Ninth Circuit and for approving the position adopted by the Second Circuit. They are: (1) that Congress cannot be presumed to have implicitly incorporated an issue exhaustion requirement into 8 U.S.C. § 1252(d)(1); (2) that this Court has taught that judges should avoid "'drive-by jurisdictional rulings'" which confuse jurisdictional questions with other forms of inquiry, *see Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006) (citation omitted); (3) that a jurisdictional issue exhaustion requirement will impose incalculable investigatory demands upon the courts of appeals; and (4) that a jurisdictional issue exhaustion requirement will flout this Court's canon preferring statutory interpretations which preserve the right to judicial review over final agency actions.

### 1. SURVEY OF THE NATIONAL LAW CONSTRUING THE IMMIGRATION APPEAL ISSUE EXHAUSTION REQUIREMENT

As is stated above, apart from the Second Circuit, most courts of appeals interpret the immigration case issue exhaustion requirement as being jurisdictional – though some do so with reservations. Panels of the First and Third Circuits have questioned the correctness of a jurisdictional issue exhaustion rule. *See Sousa v. I.N.S.*, 226 F.3d 28, 31 (1st Cir. 2000); *Lin v. Attorney General of U.S.*, 543 F.3d 114, 120 n.6 (3d Cir. 2008). In *Etchu-Njang v. Gonzales*, 403 F.3d 577 (8th Cir. 2005), the Eighth Circuit entertained the possibility (but did not explicitly hold) that issue exhaustion implicates jurisdiction. The court chiefly relied upon the argument that, because Congress was presumably aware that 8 U.S.C. § 1105a(c) (1994) (the Immigration and Nationality Act's previous judicial review statute) had been interpreted as including a jurisdictional issue exhaustion requirement, Congress could have expressly disclaimed this interpretation when it enacted 8 U.S.C. § 1252(d)(1), in 1996. *See id.*, at 582-83.

The *Etchu-Njang* Court made no effort, however, substantively to justify the view that 8 U.S.C. § 1252(d)(1) commands issue exhaustion. *Cf. Etchu-Njang*, 403 F.3d, at 581-83; *id.*, at 581. Ultimately, the court of appeals side-stepped the issue; it elected to consider whether the petitioner qualified for purported exceptions to the exhaustion rule, determined that he

did not, and then dismissed his appeal. *See id.*, at 584.

(Below, the Ninth Circuit did not consider whether the Petitioner qualified for purported exceptions to the exhaustion rule. The Ninth Circuit merely dismissed for want of jurisdiction. App. to Pet. for Cert., at pp. 1-2. As such, the Ninth Circuit's disposition may only be sustained if the Ninth Circuit's interpretation of 8 U.S.C. § 1252(d)(1) is correct.)

More recently, the Eighth Circuit has described itself as being "split" on the jurisdictional question. *Romero-Reyes v. Holder*, 362 Fed.Appx. 568, 570 (8th Cir. 2010) (not selected for publication) (citing *Mambwe v. Holder*, 572 F.3d 540, 550 (8th Cir. 2009)). The Seventh Circuit appears split as well. *Cf. Korsunskiy v. Gonzales*, 461 F.3d 847 (7th Cir. 2006), *with Pjetri v. Gonzales*, 468 F.3d 478, 481 (7th Cir. 2006).

By contrast, the Fourth and Fifth Circuits have concluded unequivocally that 8 U.S.C. § 1252(d)(1) sets forth a jurisdictional issue exhaustion rule.[5] In *Massis v. Mukasey*, 549 F.3d 631 (4th Cir. 2008), *certiorari denied sub nom., Massis v. Holder*, 130 S.Ct. 736 (2009), the Fourth Circuit held that the statute erects a jurisdictional issue exhaustion bar.

---

[5] The Sixth and Eleventh Circuits also interpret 8 U.S.C. § 1252(d)(1) as jurisdictional. *See Ramani v. Ashcroft*, 378 F.3d 554, 558-59 (6th Cir. 2004); *Fernandez-Bernal v. Attorney General of U.S.*, 257 F.3d 1304, 1317 n.13 (11th Cir. 2001).

*See Massis*, 549 F.3d, at 638-40. Disapproving the reasoning in *Zhong* – from which it contended that the Second Circuit has "since retreated" in *Grullon v. Mukasey*, 509 F.3d 107 (2d Cir. 2007), *certiorari denied*, 129 S.Ct. 43 (2008) – the Fourth Circuit determined that *Bowles v. Russell*, 551 U.S. 205 (2007) precludes the courts of appeals from excusing immigrants' administrative forfeiture (or waiver) of issues. *Cf. Massis*, 549 F.3d, at 639. Echoing *Massis*, the Fifth Circuit has embraced similar reasoning in *Omari v. Holder*, 562 F.3d 314, 324-25 (5th Cir. 2009).[6]

*Massis* and *Omari* are wrongly decided because they erroneously construe *Russell* as abrogating *Sims*. *Cf. Massis*, 459 F.3d, at 639; *Omari*, 562 F.3d, at 324. *Russell* does no such thing. *Russell* says that a statutory pre-condition to the filing of a justiciable appeal cannot be excused by a court. *Cf. Russell*, 551 U.S., at 210-12. Thus, *Russell* confirms that, since 28 U.S.C. § 2107(c) instructs that a trial court may reopen the time for perfecting a civil appeal for a

---

[6] Contrary to the view of the *Massis* Court, the Second Circuit did not retreat from *Zhong* in *Grullon v. Mukasey*, 509 F.3d 107 (2d Cir. 2007), *certiorari denied*, 129 S.Ct. 43 (2008). In *Grullon*, the court held that an alien's failure to appeal a removal order to the Board of Immigration Appeals – *a classic instance of the failure to exhaust remedies* – deprived the court of jurisdiction over his claims. *See Grullon*, 509 F.3d, at 114 (citing *Zhong*, 480 F.3d, at 118). The court interpreted *Bowles* as abrogating the "manifest injustice" exception to this jurisdictional exhaustion defect. *See Grullon*, 509 F.3d, at 109 (discussing *Marrero Pichardo v. Ashcroft*, 374 F.3d 46, 53 (2d Cir. 2004)).

period of fourteen days, the trial judge therein was without authority to grant a seventeen day reopening period. *See Russell*, 551 U.S., at 214. *Russell* is consistent with the Petitioner's view that, because 8 U.S.C. § 1252(d)(1) does not expressly adjure issue exhaustion, issue exhaustion is not jurisdictional in appeals prosecuted thereunder. *See Russell*, 551 U.S., at 213 ("Like the initial 30-day period for filing a notice of appeal, the limit on how long a district court may reopen that period is set forth in a statute, 28 U.S.C. § 2107(c). Because Congress specifically limited the amount of time by which district courts can extend the notice-of-appeal period in § 2107(c), that limitation is more than a simple 'claim-processing rule.'"); *see also United States v. Jacobo Castillo*, 496 F.3d 947 (9th Cir. 2007) (en banc) (any failure by a criminal defendant to enter properly a conditional plea of guilty could not divest the court of appeals of subject matter jurisdiction over his appeal), *id.*; at 954 (" . . . only Congress [not the Federal Rules of Criminal Procedure, which do not create or abridge substantive rights] can confer or divest the lower federal courts of subject matter jurisdiction").

The existence of the circuit split favors a grant of certiorari.

### 2. FOUR ADDITIONAL CONSIDERATIONS AGAINST THE NINTH CIRCUIT'S POSITION

Four additional considerations which militate against the position adopted by the Ninth Circuit are:

(1) that Congress cannot be presumed to have implicitly incorporated an issue exhaustion requirement into 8 U.S.C. § 1252(d)(1); (2) that this Court has taught that the courts of appeals should avoid "'drive-by jurisdictional rulings'" which confuse jurisdictional questions with other forms of inquiry, *see Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006) (citation omitted); (3) that a jurisdictional issue exhaustion requirement will impose incalculable investigatory demands upon the courts of appeals; and (4) that a jurisdictional issue exhaustion requirement will flout the Court's canon preferring statutory interpretations which preserve the right to judicial review over final agency actions.

1. First, the Eighth Circuit's suggestion that Congress approved a jurisdictional issue exhaustion rule when it enacted 8 U.S.C. § 1252(d)(1) must be rejected. On its face, 8 U.S.C. § 1252(d)(1) does not mandate that immigrants exhaust issues. The plain reading of the law must be the end of the matter.

1a. Because the text of 8 U.S.C. § 1252(d)(1) does not expressly command issue exhaustion, there is no statutory requirement to exhaust issues. Therefore, resort to legislative history – of which the Eighth Circuit's presumption (about congressional intent in enacting 8 U.S.C. § 1252(d)(1), *see Etchu-Njang*, 403 F.3d, at 582-83) is arguably a form – is

inappropriate.[7] *See Whitfield v. United States*, 543 U.S. 209, 215 (2005) ("Because the meaning of [18 U.S.C.] § 1956(h)'s text is plain and unambiguous, we need not accept petitioners' invitation to consider the legislative history."); *cf. Koons Pontiac Buick GMC, Inc. v. Nigh*, 543 U.S. 50, 73 (2004) (Scalia, J., dissenting) ("Needless to say, I also disagree with the Court's reliance on things that the sponsors and floor managers of the 1995 [Truth in Lending Act] amendment *failed* to say. I have often criticized the Court's use of legislative history because it lends itself to a kind of ventriloquism.") (footnote omitted) (emphasis supplied).[8]

---

[7] The Conference Report prepared for the Illegal Immigration Reform and Immigrant Responsibility Act, enacted on September 30, 1996, 110 Stat. 3009-546, provides, in pertinent part: "Section 242(d) [8 U.S.C. § 1152(d)] restates the provisions in the first and third sentences of subsection (c) of current section 106 [8 U.S.C. § 1105a] requiring that a petitioner have exhausted administrative remedies. . . ." H.R. Conf. Rep. 104-828, at 220.

[8] That IIRIRA was aimed at curbing immigrants' access to the courts is irrelevant to resolution of the question, whether 8 U.S.C. § 1252(d)(1) implicitly adopts a jurisdictional issue exhaustion requirement. Assuming that, in enacting IIRIRA, Congress was fixated upon changing the immigration laws in order to keep immigrants from filing deportation appeals, it is reasonable to suppose that, if Congress had wished to create or fortify a jurisdictional issue exhaustion rule, it could have inserted express language to this effect into 8 U.S.C. § 1252, so that there would be no doubt whatever about the statutory command or legislative intent.

In any event, because 8 U.S.C. § 1252(d)(1) does not clearly mandate issue exhaustion, IIRIRA policy should not influence

(Continued on following page)

1b. As is noted by the *Zhong* Court, rejection of a jurisdictional issue exhaustion requirement proceeds also from the observation that Congress possesses demonstrable experience in drafting statutes which strip the courts of appeals of subject matter jurisdiction over issues that petitioners did not press before Executive Branch agencies; and, by this token, that Congress, if it wished, was fully competent to write an issue exhaustion requirement into 8 U.S.C. § 1252(d)(1). *Cf. Vaden v. Discover Bank*, 129 S.Ct. 1262, 1272 n.9 (2009) (in construing the Federal Arbitration Act, noting that 9 U.S.C. § 203 and

---

this Court's interpretation of the law. In the analogous context of review of civil actions brought under the Prison Litigation Reform Act, legislation in respect of which "exhaustion was a 'centerpiece,'" *Jones v. Bock*, 549 U.S. 199, 214 (2007) (citation omitted), Chief Justice Roberts, writing for a unanimous Court, reversed the Sixth Circuit's practice of requiring that PLRA plaintiffs specifically plead exhaustion in their trial court complaints. *Id.*, at 211-12. The Chief Justice rejected the idea that, since the PLRA was passed in order to crack down on unexhausted prisoner lawsuits, the Sixth Circuit's practice was proper. *See id.*, 549 U.S., at 212 ("The PLRA dealt extensively with the subject of exhaustion, *see* 42 U.S.C. § 1997e(a), (c)(2), but is silent on the issue whether exhaustion must be pleaded by the plaintiff or is an affirmative defense. This is strong evidence that the usual practice should be followed, and the usual practice under the Federal Rules is to regard exhaustion as an affirmative defense. *In a series of recent cases, we have explained that courts should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns.*") (emphasis added); *id.*, at 212-13 (discussing *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 63 (1993); *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002); *Hill v. McDonough*, 547 U.S. 573 (2006)).

9 U.S.C. § 205 "demonstrate that 'when Congress wants to expand [federal-court] jurisdiction, it knows how to do so clearly and unequivocally'") (citation omitted); *Massachusetts v. E.P.A.*, 549 U.S. 497, 537 (2007) (Roberts, C.J., dissenting) (attacking the majority's gloss on 42 U.S.C. § 7521(a)(1)), *with* 15 U.S.C. § 77i(a) (Securities Act of 1933); 15 U.S.C. § 78y(c)(1) ("No objection to an order or rule of the Commission, for which review is sought under this section, may be considered by the court unless it was urged before the Court or there was reasonable ground for failure to do so.") (Securities and Exchange Act of 1934); 29 U.S.C. § 160(e) (National Labor Relations Act); 29 U.S.C. § 210(a) (Fair Labor Standards Act).[9] On a related note, the First Circuit has observed that "Congress knows how to bar claims in the immigration context when it desires to do so." *See Aguilar v. U.S. Immigration and Customs Enforcement*, 510 F.3d 1, 11 n.2 (1st Cir. 2007) (citing 8 U.S.C. § 1252(g)(2)).

In an important criminal appeal, confronted by the argument that 18 U.S.C. § 1956(h), the federal money laundering conspiracy provision, implicitly includes an overt act requirement (as exists in the general federal conspiracy law, 18 U.S.C. § 371, but not in 18 U.S.C. § 1956(h), or in the federal drug conspiracy statute, 21 U.S.C. § 846), this Court dismissed the relevance of legislative history. *See*

---

[9] The Administrative Procedure Act does not, on its face, require issue exhaustion. *See* 5 U.S.C. § 704. Nor does the Hobbs Administrative Orders Review Act. *See* 28 U.S.C. § 2349(a).

*Whitfield*, 543 U.S., at 216-17. The Court held that the use of legislative history was "particularly inapt," since: (1) Congress had knowledge of the judicial gloss on 21 U.S.C. § 846 when it enacted the money laundering conspiracy provision at issue;[10] and, (2) Congress has inserted explicit overt act elements into other conspiracy laws. *See id.* ("As the Government points out, Congress has included an express overt-act requirement in at least 22 other current conspiracy statutes, clearly demonstrating that it knows how to impose such a requirement when it wishes to do so. Where Congress has chosen *not* to do so, we will not override that choice based on vague and ambiguous signals from legislative history.") (citation omitted) (emphasis supplied). *Whitfield* supports the position that – because 8 U.S.C. § 1252(d)(1) does not explicitly require exhaustion of remedies and because Congress has explicitly required such exhaustion elsewhere in the federal books – it is inappropriate for a Court to infer that Congress intended to incorporate an issue exhaustion requirement into 8 U.S.C. § 1252(d)(1).

---

[10] Similarly, it could be argued that, in enacting 8 U.S.C. § 1252(d)(1), Congress had knowledge of *Woelke & Romero Framing, Inc. v. National Labor Relations Board et al.*, 456 U.S. 645 (1982).

Perhaps the *Whitfield* Court's observation (about what Congress may have known when it passed 18 U.S.C. § 1956(h)) cuts both ways with regard to the Petitioner's case, as the observation could also be said to validate the Eighth Circuit's presumption. *Cf. Etchu-Njang*, 403 F.3d 577 (8th Cir. 2005). (Nevertheless, as is demonstrated in text, the *Whitfield* Court relied also upon the fact that Congress has enacted other statutes which specifically include overt act elements. *See Whitfield*, 543 U.S., at 216-17.)

It should be added, the presumption that Congress incorporated a jurisdictional issue exhaustion requirement into 8 U.S.C. § 1252(d)(1), may also be overruled by that principle of this Court which provides, that "[w]e do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply. . . ." *See Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 341 (2005).[11]

2. Second, "[i]n view of the Supreme Court's series of recent and increasingly powerful opinions cautioning lower federal courts against conflating mandatory with jurisdictional prerequisites," *Zhong*, 489 F.3d, at 128 (citations omitted), the courts of appeals must be prevented from reiterating inexact conceptions of federal subject matter jurisdiction. *See Arbaugh v. Y&H Corp.*, 546 U.S. 500, 510-11 (2006) ("unrefined dispositions . . . should be accorded no precedential effect on the question whether the federal court had authority to adjudicate the claim in suit") (internal quotation marks omitted);[12] *cf. United States v. L.A. Tucker*

---

[11] The principle is somewhat inapplicable. *See Jama*, 543 U.S., at 341 (" . . . and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest").

[12] *See Arbaugh*, 546 U.S., at 511 ("On the subject-matter jurisdiction/ingredient-of-claim-for-relief dichotomy, this Court and others have been less than meticulous. . . . We have described such unrefined dispositions as 'drive-by jurisdictional rulings' that should be accorded 'no precedential effect' on the question whether the federal court had authority to adjudicate

(Continued on following page)

*Truck Lines, Inc.*, 344 U.S. 33, 39 (1952) (Frankfurter, J., dissenting) (noting, in an appeal of an Interstate Commerce Commission order, that "I do not use the term 'jurisdiction' because it is a verbal coat of too many colors."). Though *Arbaugh* is not entirely apposite factually – it overturned the Fifth Circuit's jurisdictional treatment of an element of a discrimination plaintiff's Title VII claim – it nevertheless lends considerable support to the Petitioner's argument that no jurisdictional issue exhaustion requirement applies in immigration cases because none was specified by Congress:

> Of course, Congress could make the employee-numerosity requirement "jurisdictional," just as it has made an amount-in-controversy threshold an ingredient of subject-matter jurisdiction in delineating diversity-of-citizenship jurisdiction under 28 U.S.C. § 1332. But neither § 1331, nor Title VII's jurisdictional provision, 42 U.S.C. § 2000e-5(f)(3) (authorizing jurisdiction over actions "brought under" Title VII), specifies any threshold ingredient akin to 28 U.S.C. § 1332's monetary floor. Instead, the 15-employee threshold appears in a separate provision that "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982). Given the

---

the claim in suit.") (citing *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 91 (1998)).

> "unfair[ness]" and "waste of judicial resources," App. to Pet. for Cert. 47, entailed in tying the employee-numerosity requirement to subject-matter jurisdiction, we think it the sounder course to refrain from constricting § 1331 or Title VII's jurisdictional provision, 42 U.S.C. § 2000e-5(f)(3), and to leave the ball in Congress' court. If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. *See Da Silva* [*v. Kinsho Intern. Corp.*], 229 F.3d, at 361 [(2d Cir. 2000)] ("Whether a disputed matter concerns jurisdiction or the merits (or occasionally both) is sometimes a close question."). But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character. Applying that readily administrable bright line to this case, we hold that the threshold number of employees for application of Title VII is an element of a plaintiff's claim for relief, not a jurisdictional issue.

*Arbaugh*, 543 U.S., at 514-16 (footnote omitted). The Ninth Circuit's theory of jurisdiction is in tension with *Arbaugh*.

3. Third, treating issue exhaustion as jurisdictional will impose "an unbearable burden" on the courts of appeals. *See Zhong v. U.S. Department of Justice*, 489 F.3d 126, 129 (2d Cir. 2007) (Calabresi, J., concurring

in the denial of rehearing en banc) (" . . . it would be virtually impossible, as a practical matter, for us thoroughly to search through the record in *every case* – especially in cases being decided through our Non-Argument Calendar or in summary fashion – in order to discern whether all relevant issues were adequately raised before the agency") (footnote omitted) (emphasis supplied).[13] The courts of appeals will be forced to scour the record of every pending immigration (or similar agency) appeal (including all or some appeals which have already been decided, yet over which the courts retain jurisdiction), conducting independent investigations into whether all of the issues raised by the petitioners have been sufficiently exhausted. Thus, the courts of appeals will assume an inquisitorial, Napoleonic responsibility.

---

[13] Citing *Arbaugh*, Judge Calabresi appears to suggest that judgments rendered despite the want of subject matter jurisdiction are open to collateral attack by third parties. *See Zhong*, 489 F.3d, at 129 (citing and discussing *Arbaugh*, 126 S.Ct., at 1237). Such a suggestion advances the Petitioner's cause, but may not be sound with reference to truly final judgments. *See Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.9 (1982) ("A party that has had an opportunity to litigate the question of subject matter jurisdiction may not, however, reopen that question in a collateral attack upon an adverse judgment. It has long been the rule that principles of res judicata apply to jurisdictional determinations – both subject matter and personal.") (citing *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 (1940); *Stoll v. Gottlieb*, 305 U.S. 165 (1938)).

By contrast, treating the immigrant's duty to exhaust issues as prudential, will not eviscerate the duty. A court of appeals need not, and should not, reach each and every unexhausted argument posited by a litigant; the litigant bears the burden of convincing the court that his failure to exhaust should be excused.[14]

---

[14] It is worth noting, the Ninth Circuit has previously applied the exhaustion doctrine in a manner which is not at all onerous. *See Aden v. Holder*, 589 F.3d 1040, 1047 (2009). In *Aden*, the court of appeals held that a mere prayer for relief which requested that the BIA reverse a denial of protection under the United Nations Convention Against Torture, sufficed to administratively exhaust the petitioner's CAT claim. *See Aden*, 589 F.3d, at 1047 (citing *Zhang v. Ashcroft*, 388 F.3d 713, 721 (9th Cir. 2004)).

The Petitioner's administrative appeal complained of the denial of asylum, withholding of removal, and protection under the United Nations Convention Against Torture. *See* A.R. 23. Thus, the Petitioner satisfied the easy burden imposed by *Aden* and *Zhang*.

Indeed, the court of appeals improperly treated the Petitioner's particular social group argument as if it were a separate claim which was not exhausted. *See* App. to Pet. for Cert., at pp. 1-2. The particular social group argument should be conceived as a subset of the Petitioner's asylum and withholding of removal claims; as such, the particular social group argument is exhausted. *Cf. Citizens United v. Federal Election Commission*, 558 U.S. ___, 130 S.Ct. 876, 893 (2010) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; *parties are not limited to the precise arguments they made below*.") (citing *Lebron v. National Passenger Railroad Co.*, 513 U.S. 374, 379 (1995) (quoting *United States v. Williams*, 504 U.S. 36, 41 (1994)) (internal quotation marks omitted) (emphasis added). Though the terms are often bandied about

(Continued on following page)

4. Fourth, treating administrative exhaustion as jurisdictional flouts this Court's canon which favors interpreting an ambiguous statutory passage in a manner that preserves judicial review.[15] The Court has this year applied the canon to 8 U.S.C. § 1252(a)(2)(B)(ii), which – the Court concluded – does not permit the Attorney General categorically to shield the denial of a motion to reopen removal proceedings from judicial review:

> Any lingering doubt about the proper interpretation of 8 U.S.C. § 1252(a)(2)(B)(ii) would be dispelled by a familiar principle of statutory construction: the presumption favoring judicial review of administrative action. When a statute is "reasonably susceptible to divergent interpretation, we adopt the reading that accords with traditional understandings

---

loosely, the Petitioner's ***claim*** is, strictly speaking, to asylum; his ***argument*** – in support of the claim – is that he was persecuted on account of his membership in a particular social group. *See United States v. Pallares-Galan*, 359 F.3d 1088, 1095 (9th Cir. 2004) ("As the Supreme Court has made clear, it is claims that are deemed waived or forfeited, not arguments.").

To the extent that *Rendon v. Mukasey*, 520 F.3d 967, 972 (9th Cir. 2008) suggests otherwise, it is in tension with *Aden*.

[15] In *Sun v. Ashcroft*, 370 F.3d 932 (2004), the Ninth Circuit declined to apply this canon in order to interpret the word "review" in 8 U.S.C. § 1252(d)(1) as restricted to petitions for review (as opposed to also including habeas corpus petitions.) *See Sun*, 370 F.3d, at 940-41. Application of the canon would have prevented the court of appeals from imposing what it considered to be the statutory subsection's exhaustion of remedies requirement upon the habeas petitioner therein. *See id.*

> and basic principles: that executive determinations generally are subject to judicial review." *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434, 115 S.Ct. 2227, 132 L.Ed.2d 375 (1995). We have consistently applied that interpretive guide to legislation regarding immigration, and particularly to questions concerning the preservation of federal court jurisdiction. *See, e.g., I.N.S. v. St. Cyr*, 533 U.S. 289, 298, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001); [*Reno v.*] *Catholic Social Services, Inc.*, 509 U.S., at 63-64, 113 S.Ct. 2485; *McNary* [*v. Haitian Refugee Center, Inc.*], 498 U.S., at 496, 111 S.Ct. 888. Because the "presumption favoring interpretations of statutes [to] allow judicial review of administrative action" is "well-settled," *Catholic Social Services, Inc.*, 509 U.S., at 63-64, 113 S.Ct. 2485 (quoting *McNary*, 498 U.S., at 496, 111 S.Ct. 888), the Court assumes that "Congress legislates with knowledge of" the presumption, *id.*, at 496, 111 S.Ct. 888. *It therefore takes "clear and convincing evidence" to dislodge the presumption. Catholic Social Services, Inc.*, 509 U.S., at 64, 113 S.Ct. 2485 (internal quotation marks omitted). There is no such evidence here.

*Kucana v. Holder*, 558 U.S. ___, 130 S.Ct. 827, 839 (2010) (emphasis added). Because there is not any "clear and convincing evidence" that 8 U.S.C. § 1252(d)(1) was intended to impose a jurisdictional exhaustion requirement, it must not be interpreted as imposing one.

Accordingly, for all of the foregoing reasons, this Court should grant certiorari; adjudge that any issue exhaustion rule applicable to judicial immigration appeals is not jurisdictional; and adjudge also that the failure to comply with any such rule may be excused – in exceptional circumstances – by the courts of appeals.

The question before the Court is of vital importance to the nationwide development of our immigration jurisprudence. In the Ninth Circuit alone, the question arises with a remarkable frequency which renders a grant of certiorari especially warranted. *See, e.g.*, *Lopez-Navarrete v. Holder*, 2010 WL 4851324 (Nov. 30, 2010) (not selected for publication); *Portillo-Mendez v. Holder*, 2010 WL 4780849 (Nov. 24, 2010) (not selected for publication); *Tionda v. Holder*, 2010 WL 4746148 (Nov. 23, 2010) (not selected for publication); *Orellana-Martinez v. Holder*, 2010 WL 4721196 (Nov. 22, 2010) (not selected for publication); *Hernandez v. Holder*, 2010 WL 4683903 (Nov. 21, 2010) (not selected for publication); *De La Cruz Galvan v. Mukasey*, 2010 WL 2232664 (2010) (not selected for publication); *Vasquez-Aguirre v. Holder*, 362 Fed.Appx. 736, 737 (2010) (not selected for publication); *Michel v. Holder*, 358 Fed.Appx. 980, 982 (2009) (not selected for publication); *Fajardo-Alvarez v. Holder*, 349 Fed.Appx. 198, 199 (2009) (not selected for publication); *Dhaliwal v. Holder*, 349 Fed.Appx. 147, 148-49 (2009) (not selected for publication); *Rodriguez-Vera v. Holder*, 348 Fed.Appx. 280, 281 (2009) (not selected for publication); *Gasparyan v.*

*Holder*, 339 Fed.Appx. 797, 799 (2009) (not selected for publication); *Yung Ying Shi v. Holder*, 337 Fed.Appx. 666, 668 (2009) (not selected for publication); *Gamboa Najera v. Holder*, 316 Fed.Appx. 693 (2009) (not selected for publication).

There is no advantage to be gained from waiting longer to resolve the 8 U.S.C. § 1252(d)(1) issue exhaustion controversy appropriately. This Court should grant certiorari in order fully and finally to pronounce a uniform national law.

### C. Assuming the Court determines that the courts of appeals can waive the issue exhaustion requirement, strong considerations support doing so with respect to the Petitioner's particular social group claim

Assuming the Court determines that the issue exhaustion requirement is not jurisdictional, strong considerations support waiving the (prudential) requirement. *Cf. Laing v. Ashcroft*, 370 F.3d 994, 1000-1001 (9th Cir. 2004).[16] During the course of administrative proceedings, the Petitioner was pro se.

---

[16] Should certiorari be granted, and should the Court determine that the issue exhaustion mandate is not jurisdictional, the Court is respectfully asked to remand this case to the court of appeals for a determination about whether the failure to exhaust ought to be waived.

*Cf.* App. to Pet. for Cert., at pp. 1, 3, 4. He also was detained.[17]

Whatever interest the Government possesses in enforcing the exhaustion requirement herein, the interest pales in the light of the obvious normative and humanitarian interests favoring a relaxation. *Cf. McCarthy v. Madigan*, 503 U.S. 140, 146 (1992) (exhaustion of remedies balancing test).

Thus, the Court should hold that, on remand, the court of appeals may excuse the failure to exhaust.

## II. As Applied To The Petitioner, A Jurisdictional Issue Exhaustion Requirement Would Violate The Fifth Amendment Guarantee Of Fundamentally Fair Removal Proceedings.

If this Court agrees with the Ninth Circuit that the 8 U.S.C. § 1252(d)(1) issue exhaustion burden is jurisdictional, it should nevertheless grant certiorari and remand the case to the court of appeals, so that the court of appeals may consider whether the burden, as applied to the Petitioner, is constitutional under the Fifth Amendment Due Process Clause.[18]

---

[17] For some indication regarding the Petitioner's detained status, see, for example, the letter addressed by this writer to the court of appeals on May 17, 2010, advising the court that the Petitioner had been released from detention (*i.e.*, during the pendency of his judicial appeal).

[18] Because the court of appeals did not decide the constitutional question, the Court can remand this appeal so that the court

(Continued on following page)

The Fifth Amendment has been violated here. It cannot be said that asylum, withholding of removal, and United Nations Convention Against Torture proceedings involving pro se, detained, non-English speaking asylum seekers are fundamentally fair, where the courts require the immigrants to exhaust their claims properly by raising all relevant legal and factual arguments in their administrative appeals, and where the courts dismiss non-complying appeals, even where persecution or death is a possible consequence of the dismissal. *Cf. Padilla v. Kentucky*, 559 U.S. ___, 130 S.Ct. 1473, 1484 n.11 (2010) (noting – in holding that criminal attorneys must advise their clients of the immigration consequences of various criminal case outcomes – the risk that some immigrants may be killed in their home countries). Because a jurisdictional strip enabled by the congressional exercise of an authority arising from Article III of the Constitution, must yield to the dictate of a subsequent Amendment (the Fifth Amendment), jurisdictional exhaustion here is constitutionally improper.

If the Court is unsure about whether eliminating jurisdiction over the Petitioner's particular social group claim violates the Fifth Amendment, it should nevertheless – after recognizing that 8 U.S.C. § 1252(d)(1) is at best ambiguous – resolve the issue exhaustion controversy discussed *supra* in favor of allowing review. *See I.N.S. v. St. Cyr*, 533 U.S. 289,

---

of appeals may explore the question in the first instance. *See Verizon Communications Inc. v. F.C.C.*, 535 U.S. 467, 530 (2002).

299-305 (2001) (constitutional avoidance doctrine applied to interpretation of the interaction of 28 U.S.C. § 2241 and various immigration reform laws, in the face of a "difficult and significant" Suspension Clause question). Such a result is supported also by (what may be termed) the clear statement rule which the Court has reiterated in *Kucana*; that is, the Court ought to decline to find a jurisdictional strip of the right to review over agency action, where – as here – Congress has not explicitly announced its restrictive intent. *See Kucana*, 130 S.Ct., at 839.

## CONCLUSION

Wherefore, premises considered, the Petitioner, Nilson Herney Valencia-Riascos, prays that the Court grant his petition for a writ of certiorari.

Respectfully submitted,

MATTHEW PAUL NICKSON
1300 McGowen
Houston, Texas 77004
(713) 655-8880

*Counsel of Record for the Petitioner*

December 8, 2010

**APPENDIX A**

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| NILSON HERNEY VALENCIA-RIASCOS,<br>Petitioner,<br>v.<br>ERIC H. HOLDER Jr., Attorney General,<br>Respondent. | No. 09-70384<br>Agency No. A089-246-582<br>MEMORANDUM*<br>(Filed Jun. 14, 2010) |

On Petition for Review of an Order of the Board of Immigration Appeals

Argued and Submitted June 8, 2010
Seattle, Washington

Before: CANBY, CALLAHAN and IKUTA, Circuit Judges.

Nilson Herney Valencia-Riascos, a citizen of Colombia, petitions for review of an order of the Board of Immigration Appeals ("BIA") summarily dismissing his appeal from an immigration judge's ("IJ") denial of his application for asylum, withholding of removal, and relief under the Convention Against Torture.

---

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Valencia-Riascos challenges the IJ's finding that he was ineligible for asylum because he failed to establish a nexus between his feared persecution and his membership in a particular social group consisting of the family members of his step-father. Valencia-Riascos's *pro se* Notice of Appeal to the BIA, however, even construed liberally, *see, e.g., Barron v. Ashcroft*, 358 F.3d 674, 676 n.4 (9th Cir. 2004), provided the agency no notice that he was appealing the IJ's particular social group finding. Valencia-Riascos's failure to raise the particular social group issue before the BIA constitutes a failure to exhaust administrative remedies, depriving us of jurisdiction to entertain the claims raised in Valencia-Riascos's petition for review. *Cordon-Garcia v. INS*, 204 F.3d 985, 988 (9th Cir. 2000); *see also Barron*, 358 F.3d at 678. The petition for review is, accordingly,

**DISMISSED.**

## APPENDIX B

**U.S. Department of Justice**
Executive Office of
Immigration Review

Falls Church, Virginia 22041

Decision of the Board
of Immigration Appeals

File: A089 246 582 – Tacoma, WA

Date: JAN 15 2009

In re: NILSON HERNEY VALENCIA-RIASCOS

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

APPLICATION: Asylum; Withholding of Removal; Convention Against Torture

ORDER: The Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 1003.1(e)(4).

/s/ Linda S. Wendtland
FOR THE BOARD

## APPENDIX C

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT

Tacoma, Washington

File A 89 246 582 Date: October 23, 2008

In the Matter of

| | | |
|---|---|---|
| NILSON HERNEY VALENCIA-RIASCOS | ) | IN REMOVAL PROCEEDINGS |
| Respondent | ) | |

CHARGE: Section 212(a)(6)(A)(1)

APPLICATIONS: Asylum; Withholding of Removal; Relief Under the Convention Against Torture

APPEARANCES:

ON BEHALF OF RESPONDENT:

Pro se

ON BEHALF OF THE DEPARTMENT OF HOMELAND SECURITY:

Thomas P. Molloy, Esquire

ORAL DECISION OF THE IMMIGRATION JUDGE

These proceedings were commenced with the filing of a Notice to Appear with the Immigration Court on August 14, 2008. The Respondent is alleged to be a native and citizen of Colombia who arrived in the United States on or about June 1, 2008, and was not then admitted or paroled after inspection by an

Immigration Officer. He is charged under Section 212(a)(6)(A)(1) of the Act. In response to the Notice to Appear Respondent admitted the factual allegations, the charge was therefore sustained. The Court finds that removability has been established by clear and convincing evidence. Respondent refused to designate a country to which removal could be ordered. Should removal become necessary the Court designated Colombia based on Respondent's admission of birth and citizenship in that country.

Removability having been established by clear and convincing evidence the Court will turn its attention to Respondent's Applications for Relief. The Court notes that Respondent appeared unrepresented throughout these proceedings. Respondent's rights were thoroughly explained to him including his right to Counsel. Respondent was unable to retain Counsel and therefore elected to proceed pro se.

Respondent was the only witness who testified in these proceedings. Respondent testified substantially as follows:

Respondent was from the town of Buenaventura in Colombia. This is a coastal fishing town. Respondent's step-father worked as a Captain of a fishing boat. Respondent worked as a sailor on the fishing boat captained by his step-father. In July of 2004 several members of the guerilla group who Respondent identifies as the "FAR" boarded the Respondent's step-father's fishing boat. It appears that Respondent was referring to the guerilla group known as the FARC. The members of the FARC were armed. They

demanded to speak to the Captain who was Respondent's step-father. They demanded fuel and part of the fishing catch, and also demanded that Respondent's step-father collaborate with them and perform certain errands or tasks for them. They said that if Respondent's step-father did not agree he would be killed. Respondent's step-father told the FARC that he would not be able to comply with their demands since he worked for a company and would lose his job if he turned over any of the fuel or the catch to the FARC, or if he agreed to collaborate with them in any way. Members of the FARC left the fishing boat without further incident. However, Respondent and his step-father were frightened by the threats and moved temporarily to another town, Tulua, where Respondent had relatives. Respondent's step-father was restless because he could not fish in Tulua and had no way to make a living there. He therefore returned to Buenaventura to fish. About two weeks later he was found dead. Respondent testified that no arrests were made in his step-father's assassination. Respondent and his mother returned from Tulua to Buenaventura to make the funeral arrangements. At the wake several members of the FARC came asking for Respondent, Respondent was hidden and managed to escape. Respondent went to the city of Cali for about ten days then went back to Tulua. He opened a hair salon in Tulua where he worked for about three weeks. However, members of the FARC came asking about him and said that he would not be able to escape. Respondent then closed the hair salon and fled to Cartagena. Respondent testified that from that

time on he kept moving from city to city. He never felt safe because wherever he went there would be threatening groups of people who would ask who he was and where he was from. Respondent figured that it was only a matter of time before he was discovered by the FARC.

Respondent testified that Colombia is generally unstable and that there is ongoing warfare between paramilitary groups and the FARC, that people are frequently forced to take sides, that if they do not agree to work for one side they face reprisals from the group they have refused, if they agree to work for that group they face reprisals from opposing groups.

In 2005 Respondent went to make a complaint regarding the threats against him. He explained that this was not a police station but rather a court. The complaint was made before a Judge. Respondent made this complaint hoping to procure some form of protection from the Police. However, the Police did nothing and there was no follow-up to his complaint.

Respondent testified that he believes that he would be killed in the same way that his step-father was. He testified that many of the young people with whom he grew up have been recruited by the guerillas and are now crazed killers.

On cross-examination Respondent testified that he has fathered six children with five different women and that before coming to the United States he supported his children through his own labor. He testified that when he was arrested by immigration

he was with a girl whom he had met shortly before and with whom he was traveling.

He testified that he had no involvement in political groups in Colombia nor did his step-father, but that he and his step-father would vote in political elections like all Colombian citizens.

He testified that he was planning to apply for Asylum in the United States, however he did not do so until he was arrested by immigration because he wanted to get the advice of a knowledgeable person before submitting an Application. Respondent's mother and sisters still reside in Colombia.

When asked why the FARC would target Respondent given that he was not a person responsible for making decisions about whether or not to turn over fuel or part of the catch to the guerillas, Respondent testified that when a person is killed by the guerillas the guerillas fear that that person's relatives will want to take revenge and join opposing groups such as the paramilitary groups. Therefore the FARC is motivated to eliminate such people. Respondent testified that he has never joined any paramilitary group and is not interested in doing so. Respondent performed obligatory Military service for 18 months when he was 18 years old. This would have been several years before the incident in the fishing boat.

On re-direct Respondent testified that he was shot once when a paramilitary group opened fire on a group of young people playing soccer in a soccer field. Respondent was wounded in the leg. This was in

approximately 2003 prior to the incident in the fishing boat. Respondent testified that he did not include this in his Application because it was not related to his case and because he was not seriously injured. Respondent testified that although he did not have personal knowledge of who was shooting or why witnesses gave information leading Respondent to believe that it was the paramilitary groups who opened fire and not the FARC.

In order to qualify for Asylum Respondent must establish persecution or a well-founded fear of persecution based on his race, religion, nationality, membership in a particular social group, or political opinion. He must establish a genuine fear of persecution and further show that this fear is well-founded. The Court notes that Respondent is not barred from Asylum under Section 208(a)(2)(B) in that he submitted his Application within one year of entering the United States. The Court further notes that Respondent's Application is governed by the REAL ID Act.

The Government concedes that Respondent testified credibly in these proceedings, and the Court so finds Respondent testified consistently in what appeared to the Court to be an entirely straight forward manner. Respondent submitted documentation corroborative of his claim. The Court notes that not all of Respondent's documents were admitted into this record because of defects in translation or lack of translation. However, the Court notes that Respondent is proceeding pro se and does not speak English and has been detained throughout these

proceedings. The Court believes that Respondent made a good faith effort to corroborate his claim. The Government does not contest this. The Government however, opposes a grant of Asylum in this matter arguing that Respondent has not established a nexus to a protected ground. Respondent did not in his testimony identify a specific protected ground that he was asserting in his Application Form marked into the record as Exhibit 2. Respondent indicated that he was applying for Asylum on the basis of his political opinion. However, since Respondent is unrepresented the Court believes it appropriate to move beyond his Application and the asserted protected ground to determine whether any other protected grounds are implicated in this case.

The Court can not find that Respondent has a well-founded fear of persecution on account of his political opinion. Respondent never asserted any political opinion to the FARC and there is no reason why the FARC would attribute any particular political opinion to him. Respondent's step-father was murdered presumably by the FARC because he refused to provide material aid or collaboration with the FARC. This does not mean however that he was killed on account of his political opinion. Respondent testified that his step-father asserted that he could not help the FARC because this would cause problems with the company for whom he worked and that he could lose his job. There is no indication on this record that the FARC was motivated to punish

Respondent's step-father for any other reason then his refusal to cooperate with them.

The Government argues, and the Court agrees, that this case is similar to the Supreme Court decision in *INS v. Elias-Zacarias,* 502 U.S. 478 (1992). In that case the Applicant for Asylum had asserted eligibility for Asylum based on threats received from guerilla groups when he refused to collaborate with them. As in that case, here, Respondent's step-father's refusal to collaborate implicated no political opinion. The Court finds that Respondent does not have a well-founded fear of persecution on account of his political opinion.

The Court must determine whether there is any other ground implicated in this case. The Court believes it could be argued that Respondent fears persecution on account of his membership in the particular social group of relatives of his step-father or crew members on his step-father's boat. However, there is no indication that the other crew members on Respondent's step-father's boat suffered any reprisals from the FARC. As to Respondent's membership in the group of family members of Respondent's step-father, the Court notes that Respondent's other relatives, his mother and his sisters, continue to reside in Colombia. Respondent testified that the FARC would want to harm him because they feared that he would join a paramilitary group or some other group opposing the FARC. This would presumably place him in a situation situated differently from his mother and sisters since presumably it would be less

likely that females would join paramilitary groups. The Court finds however, that Respondent's analysis of the situation is somewhat speculative and it is unclear to what extent Respondent's step-father may have other male relatives still living in Colombia. The Court finds that Respondent has not established a nexus to a protected ground, his Applications for Asylum and Withholding are therefore denied. The Court notes that in order to be eligible for Withholding under Section 241(b)(3) Respondent must also establish a nexus to a protected ground.

The Court will next turn it's attention to Respondent's Application for Withholding Under the Convention Against Torture. Relief Under the Convention Against Torture requires that Respondent establish that it is more likely than not that he would be tortured in his country. Unlike Withholding and Asylum there is no requirement that Respondent establish a nexus to a protected ground. However, the torture must be inflicted for one of four purposes: (1) for obtaining information or a confession, (2) for punishing for an act committed or suspected of having been committed, (3) for intimidation or coercion, or (4) for any reason based on discrimination of any kind.

The harm that Respondent fears is certainly grave enough to amount to torture, which is defined as any act by which severe pain or suffering whether physical or mental is intentionally inflicted on a person. Respondent fears being killed as his step-father was and testified that guerilla groups in Colombia

sometimes behead their victims and deliver the victims' heads to the victims family.

The Court must then determine whether it is more likely than not that Respondent would suffer such treatment and whether such treatment would be with the consent or acquiescence of a public official or other person acting in an official capacity.

The Court will first address the question of likelihood of torture. Respondent has never been harmed specifically by the guerillas in any physical sense, however, he has been sought by the guerillas and the Court believes it reasonable to assume that if the guerillas were to capture him he would be dealt with the same as his step-father. The Court notes that Respondent was successful in avoiding this fate for approximately three years between the time when his stepfather's vessel was boarded by the guerillas and when he left Colombia in late 2007. Respondent traveled from city to city and was not apprehended by the FARC. Respondent fears however that he would eventually be found out and captured. The Court believes that there is certainly a possibility that this would occur. The Court however can not find that it is more likely than not. After Respondent left Tulua there is no indication that he was specifically sought for by the guerillas in any other city. In addition the Court can not find that if Respondent were apprehended by the guerillas that any treatment of him would be with the consent or acquiescence of a public official. The Court will credit Respondent's testimony that the Government provided him with no

assistance. The Court, however, believes that this is a different standard then consent or acquiescence which requires that the Government turn a blind eye to harm to the Respondent.

In this case the Court has reviewed the Department of State Report which is in many senses corroborative of the type of problems described by Respondent. However, the report also indicates that the Government has been attempting to control the FARC for a very long time. The fact that they have not been successful in providing a protection to the entire civilian population is not indicative of consent or acquiescence.

The Court regrets that the provisions of law which the Court must apply in this case do not offer adequate protection to the Respondent. The Court believes in fact that Respondent may undergo some danger if returned to Colombia. The Court finds however that the provisions of law are inadequate to provide him protection.

Accordingly the following Order shall enter:

ORDER

Respondent's Applications for Asylum, Withholding of Removal, and Relief Under the Convention Against Torture are hereby denied.

Respondent is ordered removed from the United States to Colombia on the charge contained in the Notice to Appear.

/s/ _____
MIRIAM R. HAYWARD
Immigration Judge

---

CERTIFICATE PAGE

I hereby certify that the attached proceeding before MIRIAM R. HAYWARD, in the matter of:

NILSON HERNEY VALENCIA-RIASCOS

A 89 246 582

Tacoma, Washington

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

/s/ Rhonda E. Priest
Rhonda E. Priest, Transcriber

YORK STENOGRAPHIC
SERVICES, INC.
34 North George Street
York, Pennsylvania 17401-1266
(717) 854-0077

December 5, 2008
Completion Date

rep/seh

## APPENDIX D

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
1623 East J Street, Suite 3
Tacoma, WA 98421

In the Matter of: **VALENCIA-RIASCOS, NILSON HERNEY**
Respondent

Case No.: **A 089-246-582**
IN REMOVAL PROCEEDINGS

[AMENDED]
ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on **10/23/2008**. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion of the case.

[X] The respondent was ordered removed from the United States to Colombia.

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to _____ alternative to _____.

[ ] Respondent's application for voluntary departure was granted until _____ to _____ upon posting a bond in the amount of $_____ with the alternate order of removal to _____.

Respondent's application for:

[X] Asylum was
( ) granted (X) denied ( ) withdrawn.

[X] Withholding of removal was
( ) granted (X) denied ( ) withdrawn.

[ ] A Waiver under Section _____ was
( ) granted ( ) denied ( ) withdrawn.

[ ] Cancellation of removal under section 240A(a) was
( ) granted ( ) denied ( ) withdrawn.

Respondent's application for:

[ ] Cancellation of removal under section 240A(b)(1) was
( ) granted ( ) denied ( ) withdrawn.
If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Cancellation of removal under section 240(b)(2) was
( ) granted ( ) denied ( ) withdrawn.
If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's application for adjustment of status under section _____ of the INA was
( ) granted ( ) denied ( ) withdrawn.
If granted, it was ordered that respondent be issued all appropriate documents necessary to give effect to this order.

[X] Respondent's application for (X) withholding of removal ( ) deferral of removal under Article III of the Convention Against Torture was
( ) granted (X) denied ( ) withdrawn or
( ) other.

[ ] Respondent's status was rescinded under section 246.

[ ] Respondent is admitted to the United States as a _____ until ___/___/____.

[ ] As a condition of admission, respondent is to post a $_____ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

[ ] Proceedings were terminated.

[ ] Other: _____

Date: 10/23/08 /s/ Miriam Hayward
Miriam Hayward
Immigration Judge

Appeal: ~~WAIVED~~ / RESERVED ( A / I / B )

Appeal Due By: 11/24/08

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY:
MAIL (M) PERSONAL SERVICE (P) FAX (F)

TO: [ ] ALIEN [✓] ALIEN c/o Custodial Officer
[ ] ALIEN's ATT/REP [P] DHS

DATE: **10/23/08** BY: COURT STAFF **IJ: MH**

Attachments: [ ] EOIR-33 [ ] EOIR-28
[ ] Legal Services List

Q6

## APPENDIX E

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
1623 East J Street, Suite 3
Tacoma, WA 98421

In the Matter of — Case No.: **A 089-246-582**

**VALENCIA-RIASCOS, NILSON HERNEY**

Respondent — IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on **10/23/2008**. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion of the case.

[X] The respondent was ordered removed from the United States to Colombia.

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to _____ alternative to _____.

[ ] Respondent's application for voluntary departure was granted until _____ to _____ upon posting a bond in the amount of $_____ with the alternate order of removal to _____.

Respondent's application for:

[X] Asylum was
( ) granted (X) denied ( ) withdrawn.

[X] Withholding of removal was
( ) granted (X) denied ( ) withdrawn.

[ ] A Waiver under Section _____ was
( ) granted ( ) denied ( ) withdrawn.

[ ] Cancellation of removal under section 240A(a) was
( ) granted ( ) denied ( ) withdrawn.

Respondent's application for:

[ ] Cancellation of removal under section 240A(b)(1) was
( ) granted ( ) denied ( ) withdrawn.
If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Cancellation of removal under section 240(b)(2) was
( ) granted ( ) denied ( ) withdrawn.
If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's application for adjustment of status under section _____ of the INA was
( ) granted ( ) denied ( ) withdrawn.
If granted, it was ordered that respondent be issued all appropriate documents necessary to give effect to this order.

[X] Respondent's application for (X) withholding of removal ( ) deferral of removal under Article III of the Convention Against Torture was
( ) granted (X) denied ( ) withdrawn or
( ) other.

[ ] Respondent's status was rescinded under section 246.

[ ] Respondent is admitted to the United States as a _____ until ____/____/____.

[ ] As a condition of admission, respondent is to post a $ _____ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

[ ] Proceedings were terminated.

[ ] Other: _____

_____

Date: 10/23/08 /s/ Miriam Hayward
Miriam Hayward
Immigration Judge

Appeal: [WAIVED] / RESERVED ( [A] / I / B )

Appeal Due By: 11/24/08

---

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY:
MAIL (M) PERSONAL SERVICE (P) FAX (F)

TO: [ ] ALIEN [✓] ALIEN c/o Custodial Officer
[ ] ALIEN's ATT/REP [P] DHS

DATE: **10/23/08** BY: COURT STAFF **IJ: MH**

Attachments: [ ] EOIR-33 [ ] EOIR-28
[ ] Legal Services List

_____ Q6

**APPENDIX F**

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| NILSON HERNEY VALENCIA-RIASCOS,<br>Petitioner,<br>v.<br>ERIC H. HOLDER Jr., Attorney General,<br>Respondent. | No. 09-70384<br>Agency No. A089-246-582<br>ORDER<br>(Filed Sep. 9, 2010) |

Before: CANBY, CALLAHAN and IKUTA, Circuit Judges.

The panel has unanimously voted to deny the petition for panel rehearing. Judges Callahan and Ikuta have voted to deny the petition for rehearing en banc, and Judge Canby has recommended granting en banc rehearing.

The petition for en banc rehearing has been circulated to the full court, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for panel rehearing and the petition for rehearing en banc are DENIED.